Guidelines on video-sharing platforms and European works under revised AVMSD

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On 2 July 2020, the European Commission published two important sets of guidelines pursuant to the revised Audiovisual Media Services Directive (AVMSD) which extends audiovisual rules to what are termed video-sharing platforms (see IRIS 2019-1/1). The first set of guidelines concerns the application of the "essential functionality" criterion of the definition of a video-sharing platform under the AVMSD; while the second set of guidelines relates to the calculation of the share of European works in on-demand catalogues.

First, under Article 28b(1) of the AVMSD, member states are required to ensure that video-sharing platform providers under their jurisdiction take appropriate measures to protect minors from certain harmful content, and the general public from certain illegal content. Crucially, a lengthy definition of a video-sharing platform service is contained in Article 1(aa), which includes where an "essential functionality" of a service is devoted to providing programmes, user-generated videos, or both, to the general public. Recital 5 of the AVMSD provides that the European Commission should issue guidelines on the practical application of the essential functionality criterion. In the first set of seven-page guidelines released, the Commission identifies relevant indicators that national authorities should consider when applying the essential functionality criterion, including (a) the relationship between the audiovisual content and the main economic activity or activities of the service; (b) the quantitative and qualitative relevance of the audiovisual content for the activities of the service; (c) the monetisation of, or revenue generation from the audiovisual content; and (d) the availability of tools aimed at enhancing the visibility or attractiveness of the audiovisual content. Finally, although guidelines are not binding, it is stated that cooperation between national authorities "could be desirable especially in order to gather the relevant data or information and to limit the risks of divergent interpretations" of the indicators.

Secondly, Article 13(1) of the AVMSD provides that member states must ensure that media service providers of on-demand audiovisual media services under their jurisdiction secure at least a 30% share of European works in their catalogues and ensure the prominence of those works. Furthermore, Article 13(2) provides that where member states require media service providers under their jurisdiction to contribute financially to the production of European works, they may also require

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media service providers targeting audiences in their territories but established in other member states to make such financial contributions. However, Article 13(6) provides that the 30% obligation imposed under Article 13(1) and the financial contribution requirements under Article 13(2) shall not apply to media service providers with a “low turnover or a low audience”. Notably, the Commission is required to issue guidelines on the calculation of the share of European works, and on the definition of "low audience" and "low turnover". As such, in the second set of seven-page guidelines, the Commission considers that it is appropriate to calculate the 30% share of European works in on-demand catalogues based on the total number of titles in the catalogue, and explains what constitutes a title, how to calculate in cases where VOD providers have multiple national catalogues, and where catalogues may vary on a day-to-day basis. The Commission also gives guidance on interpreting low audience and turnover. Importantly, the Commission notes that while the implementation of Article 13 AVMSD lies with the national authorities, “they are encouraged to cooperate actively with their counterparts in other Member States in the areas covered by the present guidelines.”

Finally, it should be noted that member states are required to transpose the revised AVMSD into national law by 19 September 2020.

European Commission, Guidelines on the practical application of the essential functionality criterion of the definition of a ‘video-sharing platform service’ under the Audiovisual Media Services Directive (2020/C 223/02), 7 July 2020.

https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020XC0707(02)&from=EN

European Commission, Guidelines pursuant to Article 13(7) of the Audiovisual Media Services Directive on the calculation of the share of European works in on-demand catalogues and on the definition of low audience and low turnover, 7 July 2020.

https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020XC0707(03)&from=EN

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